ORIGINAL

Nos. 89-1696, 89-1714, 90-113 and 90-114

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

PEABODY COAL COMPANY, et al., Petitioners,

v.

HUBERT C. TAYLOR, et al., Respondents.

HARRIET PAULEY, Survivor of JOHN C. PAULEY, Petitioner,

v.

BETHENERGY MINES, INC., et al., Respondents.

CLINCHFIELD COAL COMPANY, Petitioner,

v.

JOHN A. TAYLOR, et al., Respondents.

RECEIVED
SEP 21 1990
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CONSOLIDATION COAL COMPANY, Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, et al., Respondents.

MOTION TO CONSOLIDATE

The undersigned counsel for the petitioners in Nos. 89-1696, 90-113 and 90-114 and for the respondent BethEnergy Mines, Inc. in 89-1714 respectfully move, in accordance with Supreme Court Rule 21, that these four pending petitions for certiorari be consolidated for such further consideration as may be accorded to them by the Court. It is further moved, should certiorari be granted, that the Court order consolidated briefing and argument under such terms and conditions as the Court thinks appropriate in accordance with Supreme Court Rule 27.3. This motion should be granted for the following reasons.

I.

Several thousand federal black lung benefits claims, filed before April 1, 1980, are now well into their second decade of litigation. The most significant reason for the inability of the system to finally resolve these old cases is the difficulty experienced by the courts of appeals in reaching agreement on the identity and meaning of the eligibility criteria to be applied in the cases. The continuation of these unfortunate circumstances is not necessary, as this Court is now presented with the opportunity to bring them to an end. These movants reasonably believe that consolidation is most likely to achieve this worthwhile goal, while piecemeal disposition of the four cases may instead require renewed requests for this Court's intervention in the future, and further prolong the litigation of many cases that should have been resolved long ago.

II.

The four petitions present distinct, but closely related, disagreements among the circuits. The Sixth Circuit and the Seventh Circuit disagree over the validity of 20 C.F.R. § 727.203(b), to the extent that this rule permits rebuttal of the Department of Labor ("DOL") black lung interim presumption if a rebuttal fact is proven in light of all relevant medical evidence. Compare Youghiogheny and Ohio Coal Co. v. Milliken, 866 F.2d 195, 202 (6th Cir. 1989), with Taylor v. Peabody Coal Co. II, 892 F.2d 503, 507 (7th Cir. 1989). The Third Circuit and Fourth Circuit disagree over whether 20 C.F.R. § 727.203(b)(3) is a valid rule. Compare BethEnergy Mines, Inc. v. Director, Office of Workers' Compensation Programs, 890 F.2d 1295 (3d Cir. 1989), with Taylor v. Clinchfield Coal Co., 895 F.2d 178, 183 (4th Cir. 1990). The Fourth Circuit, in Taylor v. Clinchfield Coal Co. and Dayton v. Consolidation Coal Co., 895 F.2d 173 (4th Cir. 1990), has invalidated DOL rebuttal rule 20 C.F.R. § 727.203(b)(4). The Seventh Circuit's holding is generally in accord. It is, however, fairly apparent that the Third Circuit and Sixth Circuit would uphold this rule.

The principal question to be answered in all the pending petitions is whether the Black Lung Benefits Act, 30 U.S.C. §§ 901-945, prohibits DOL from writing an interim presumption according mine operators a fair opportunity to rebut any presumed fact in light of whatever evidence is indicative of the truth or falsity of that fact. The four cases together provide a reasonably complete diagram of the contours of the question. No one of the

cases standing alone ensures a final resolution. All four cases are properly postured for consideration of the principal question and no one of them is controlled by its individual facts.

Mrs. Pauley does not dispute the fact that her husband's disability was wholly unrelated to black lung disease. She argues only that this fact is legally irrelevant. Hubert Taylor never challenged the ALJ's conclusion that the evidence established rebuttal under section 727.203(b)(2) of the DOL rule.[1] In John Taylor, the only operative facts within the scope of the petition for certiorari and the Fourth Circuit's decision are that Taylor does not have pneumoconiosis or any disability related to the disease. In Dayton, the only operative facts are that Dayton does not have either pneumoconiosis or any disability for work.[2] There is no need for a printing of a joint appendix in any or all of the cases.

Pauley addresses DOL's third method of rebuttal. John Taylor addresses the third and fourth methods and also addresses a method of invocation not addressed in Pittston Coal Group v. Sebben, 488

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[1] In responding to Peabody's petition for certiorari, Taylor argues for the first time that the ALJ's section 727.203(b)(2) rebuttal finding was in error. Brief for Respondent Hubert Taylor in Opposition at 9-13. This was not raised in the prior trip to this Court, two trips to the court of appeals or before the Benefits Review Board or the ALJ. It is not within the scope of the issues presented and Hubert Taylor's failure to present the matter to the agency constitutes a failure to exhaust his administrative remedies. The decision in this regard is final and should not be considered by this Court. See Hoover v. Ronwin, 466 U.S. 558, 574 n.25 (1984).

[2] John Taylor and Dayton were proper subjects for a joint petition for certiorari in accordance with Supreme Court Rule 12.2. This was not accomplished for reasons that are non-germane to the issues or the positions of the respective petitioners.

U.S. 105 (1988). Dayton directly addresses the fourth method. Hubert Taylor addresses the relevance of medical evidence across the Board and touches on the second method. A complete resolution of the tensions between the SSA presumption, 20 C.F.R. § 410.490, and the DOL regulation can be accomplished within the parameters of these four cases. In Pittston Coal Group, this Court needed to resolve only one segment of the puzzle. It is respectfully urged that the Court take this opportunity to complete the solution.

III.

DOL urges this Court to select one case or another with the hope that a simplified approach will be good enough, assuming perhaps that the Court's guidance in any one of the cases will prove sufficient for the resolution of the rest.[3] This is a risky assumption that is not supported historically in the black lung decisional law of the courts of appeals. Just as Pittston Coal Group did not genuinely compel any definitive conclusion in these four cases a piecemeal resolution of the remaining issues by this Court may only lead to additional years of litigation.

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[3] The Government is properly concerned with the unreported death of Hubert Taylor during the pendency of his 1987 petition for certiorari in this Court, and the unreported death of John Pauley during his Benefits Review Board appeal. Since both cases still involve statutory parties who are entitled to collect whatever benefits were due to the deceased individuals, and in light of the reasonable steps taken to accomplish substitution nunc pro tunc, the abatement of Pauley's claim and Hubert Taylor's claim should not be required. If the Court deems the two cases to have abated, it is then requested that the two Fourth Circuit cases be consolidated for whatever purposes are appropriate.

CONCLUSION

For these reasons, it is respectfully requested that this Motion be granted.

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